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No. 87-395

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD ROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner faces a real and substantial risk of foreign prosecution.

2. If so, whether petitioner may assert his Fifth Amendment privilege against compelled self-incrimination, despite a grant of use immunity, and refuse to testify before a federal grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 825 F.2d 494. The memorandum orders of the district court are under seal and have not been published or included in the appendix to the petition.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1987. The petition for a writ of certiorari was filed on September 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a citizen of Country X, although he currently resides in the United States with his wife and children. He is the manager of a United States branch of a bank owned by the government of Country X. In the past, petitioner was the assistant manager of the bank's branch in Country Y, a nation with bank secrecy laws that make it a criminal offense to reveal to anyone other than the customer information about banking transactions or bank documents created in Country Y that relate to the customer and his transactions. Pet. App. A3, A5.[1]

A federal grand jury is investigating a scheme by a number of American citizens and business entities to launder money, in violation of 18 U.S.C. 371 and 31 U.S.C. 5322. The grand jury issued subpoenas to both petitioner and the bank, seeking petitioner's testimony and bank records believed to be held in the branch bank in Country Y. Neither petitioner nor the bank are targets of the investigation. In partial compliance with the subpoena, petitioner has testified before the grand jury. He has refused, however, to testify about the banking activities of certain bank customers from whom the bank was unable to obtain releases. Petitioner claimed that any testimony on that subject would expose him to prosecution in Country Y. Pet. App. A3-A5.

The district court granted petitioner use immunity pursuant to 18 U.S.C. 6002 and 6003. Following a hearing, the court ordered him to comply with the subpoena. The court held that even if the Fifth Amendment protects against the threat of a foreign prosecution, the threat that petitioner's testimony would be used against him in a prosecution in Country Y was not "real and substantial," as is required by *Zicarelli* v. *New Jersey Comm'n of Investigation*, 406 U.S. 472, 478-481 (1972) (Pet. App.

[1] Petitioner owns a house in Country Y, and his wife has relatives there.

A12-A13). The court reasoned that the strict secrecy requirements of Rule 6(e), Fed. R. Crim. P., would prevent the disclosure of petitioner's testimony, so that any evidence obtained will be unavailable to officials of Country Y without a court order. Petitioner persisted in his refusal to testify, and he was held in contempt. The district court ordered that petitioner be confined until he purged himself of contempt, but stayed the sanction pending appeal (Pet. App. A8).[2]

The court of appeals affirmed the contempt order with respect to petitioner.[3] Relying, like the district court, on *Zicarelli*, the court held that an immunized witness cannot invoke the Fifth Amendment to refuse to testify in the absence of a real fear of foreign prosecution. The court found that in this case, petitioner's fear of prosecution was not "real" (Pet. App. A13). The court relied on the fact that petitioner cannot be extradited for violating the bank secrecy laws of Country Y. Therefore, petitioner can be subject to prosecution there only if he voluntarily returns to that country. Petitioner, however, no longer lives or works in Country Y. Moreover, his immediate family is in the United States. Petitioner could thus be subject to prosecution in Country Y only if he "voluntarily assumed" that risk (*id.* at A14) by traveling there, a course of action that the court of appeals held is not within the protection of the Fifth Amendment.[4]

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[2] The district court also held the bank in contempt, and ordered the bank to pay a fine of $50,000 per day until it complied with the subpoena.

[3] The portion of the district court's order holding the bank in contempt was reversed (Pet. App. A14-A24).

[4] The court stayed issuance of the mandate pending disposition of the case in this Court (Pet. 10).

ARGUMENT

Contrary to the findings of both courts below, petitioner contends that he faces a "real and substantial" threat of prosecution in Country Y if he is compelled to testify before the grand jury. He further contends that the Fifth Amendment shields him from giving testimony that might incriminate him under the laws of Country Y.

1. Petitioner apparently agrees that in the absence of a "real and substantial" risk of a foreign prosecution, use immunity is sufficient to protect the Fifth Amendment rights of a witness summoned to testify before a grand jury. See Pet. 11-12. As this Court held in *Zicarelli*, 406 U.S. at 478 (footnote omitted), the Fifth Amendment privilege "protects against real dangers, not remote and speculative possibilities." Nevertheless, petitioner claims (Pet. 12-16) that review by this Court is appropriate to give guidance to the courts of appeals regarding which factors are relevant in determining when a "real and substantial" risk of foreign prosecution exists. He notes that the courts of appeals have relied on various factors in holding that particular witnesses have not met the threshold burden of *Zicarelli*. Therefore, he argues, the circuits are in conflict on that issue. But the differences in analysis in the cases simply reflect the different facts that were before the reviewing courts. Significantly, petitioner cannot point to a single circuit that would have decided his case differently. Under any analysis, petitioner's fear of foreign prosecution is not substantial.

For instance, like the district court in this case, several courts of appeals have considered protective orders and rules governing grand jury secrecy to be sufficient to protect a witness against the risk that his compelled testimony may be used in a foreign prosecution. See, *e.g.*, *United States* v. *Joudis*, 800 F.2d 159, 161-164 (7th Cir. 1986); *In re Application of President's Comm'n on Organized Crime*, 763 F.2d 1191, 1199 (11th Cir. 1985); *In re Grand*

Jury Proceedings (Chevrier), 748 F.2d 100, 104-105 (2d Cir. 1984); *In re Grand Jury Proceeding 82-2 (Nigro)*, 705 F.2d 1224, 1227 (10th Cir. 1982) (collecting cases), cert. denied, 461 U.S. 927 (1983). There is no reason to believe that Rule 6(e) will be violated in this case.

In assessing the likelihood of a foreign prosecution, the courts have also considered whether charges are currently pending against the prospective witness in the foreign country. See, *e.g.*, *United States* v. *(Under Seal)*, 794 F.2d 920 (4th Cir. 1986), cert. denied, No. 86-172 (Oct. 20, 1986); *In re Grand Jury Subpoena (Flanagan)*, 691 F.2d 116, 121 (2d Cir. 1982). In this case, no charges are pending against petitioner in Country Y.[5]

Another factor that the courts consider is whether the witness can be extradited for the crimes that may be revealed by his grand jury testimony. See, *e.g.*, *Flanagan*, 691 F.2d at 122 (no substantial risk of foreign prosecution because extradition treaty did not include offense under investigation); *In re Gilboe*, 699 F.2d 71, 76-77 (2d Cir. 1983) (extradition improbable because of procedural provisions in extradition treaty). As petitioner acknowledges, he cannot be extradited for violating the bank secrecy laws of Country Y. Therefore, he can be subject to prosecution in Country Y only if he goes there voluntarily and makes himself available for prosecution. All of these factors weigh against petitioner's claim of a substantial risk of prosecution in Country Y. Accordingly, petitioner would not have met his threshold burden in any circuit.

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[5] It is far from clear that any such charges will be brought if petitioner is compelled to give the requested information by court order. In most jurisdictions such compulsion would be a defense. Considerations of comity and foreign relations may also discourage Country Y from prosecuting someone who has merely obeyed a court order in the United States.

Nor is the decision below contrary to *Zicarelli*. *Zicarelli* does not prohibit the courts of appeals from considering any of the factors discussed above. Those factors were irrelevant in *Zicarelli* because the witness there failed to meet his threshold burden for another reason: he was asked a question that did not place him "in real danger of being compelled to disclose information that might incriminate him under foreign law." 406 U.S. at 480.[6]

Finally, petitioner argues that by compelling petitioner to testify, the district court has unlawfully curtailed his right to travel to County Y and has deprived him of the enjoyment of the house he owns in Country Y. Of course, the district court did not bar petitioner from travelling to Country Y. At most, the court's order may discourage petitioner from doing so. But the order is not unconstitutional simply because it may have an incidental effect on his decision to travel. Cf. *Califano* v. *Aznavorian*, 439 U.S. 170, 176 (1978) (statute discontinuing disability

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[6] Contrary to petitioner's suggestion (Pet. 19-21), *Pillsbury Co.* v. *Conboy*, 459 U.S. 248 (1983), has no application here. In that case, Conboy testified before a grand jury under a grant of use immunity. He was later asked to answer similar questions in a civil deposition taken by Pillsbury. Conboy had not been granted immunity with respect to the deposition. This Court held that Conboy could assert his Fifth Amendment privilege and refuse to answer the questions posed in the deposition (*id.* at 263-264 (footnote omitted)):

> a deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of [18 U.S.C. 6002], and therefore may not be compelled over a valid assertion of his Fifth Amendment privilege.

Conboy thus simply stands for the unremarkable proposition that in the absence of use immunity, a witness can invoke his privilege against compulsory self-incrimination. *Conboy* did not in any way address the question whether an asserted risk of foreign prosecution would justify the witness's refusal to testify in a forum where he had been granted use immunity.

benefits while the recipient is traveling abroad is not an unconstitutional infringement on the right to travel). Compare *Haig* v. *Agee*, 453 U.S. 280 (1981) (revocation of passport not unconstitutional when reasonably related to national security interests); *Zemel* v. *Rusk*, 381 U.S. 1 (1965) (travel to Cuba may be restricted). Indeed, petitioner has not shown that there is a realistic likelihood that Country Y will prosecute him even if he does return there. Whether or not Country Y vigorously enforces its bank secrecy laws, it is sheer speculation to say that Country Y would prosecute petitioner for divulging information about American citizens and businesses under the compulsion of an order of a United States court. See note 5, *supra*. In these circumstances, where the risk of a foreign prosecution is so speculative, petitioner's due process challenge to the contempt order also must fail.

2. Petitioner next argues that this Court should grant review to determine whether the Fifth Amendment protects a witness against compelled self-incrimination where there is a "real and substantial" risk of foreign prosecution. This issue is not properly presented here because, as we have shown, petitioner did not carry his threshold burden of showing that the risk that he will be prosecuted in Country Y is "real and substantial." Furthermore, there is no appellate conflict on this issue. The only two courts of appeals that have reached this question have held that the Fifth Amendment does not protect a witness against the risk that his testimony may be used against him by a foreign government. *In re Grand Jury Proceedings (Doe No. 700)*, 817 F.2d 1108, 1112 (4th Cir. 1987), cert. denied, No. 87-34 (Oct. 5, 1987); *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), vacated and dismissed as moot, 397 U.S. 96 (1970). The only state court to address the question has reached the same conclusion. *Phoenix Assurance Co.* v. *Runck*, 317 N.W.2d 402, 413 (N.D.), cert. denied, 459 U.S. 862 (1982). Three district courts have agreed with petitioner's

position on the Fifth Amendment issue, but those decisions have never been embraced by their respective circuits. See *Mishima* v. *United States*, 507 F. Supp. 131, 135 (D. Alaska 1981); *United States* v. *Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981); *In re Cardassi*, 351 F. Supp. 1080, 1085-1086 (D. Conn. 1972). Few courts have had to address the constitutional question, because the subpoenaed witness can rarely make the threshold showing of a substantial risk of a foreign prosecution that is required by *Zicarelli*. In light of the absence of any conflict among the circuits on this issue and the infrequency with which the issue arises, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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